

STATE OF MICHIGAN
IN THE SUPREME COURT

PEOPLE OF THE STATE OF MICHIGAN

Plaintiff-Appellee

-VS-

JUSTIN TIMOTHY COMER

Defendant-Appellant.

Supreme Court No. 152713

Court of Appeals No. 318854

Lower Court No. 11-001804 FC

ST. CLAIR COUNTY PROSECUTOR

Attorney for Plaintiff-Appellee

Jacqueline C. Ouvry (P71214)

Attorney for Defendant-Appellant

SUPPLEMENTAL BRIEF ON APPEAL

OPINION OF COURT OF APPEALS

CERTIFICATE OF SERVICE

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CERTIFICATE OF SERVICE

STATE OF MICHIGAN)
) ss.
COUNTY OF WAYNE)

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Jacqueline C. Ouvry (P71214)

29458

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STATEMENT OF QUESTIONS PRESENTED

I. Was defendant's original sentence was not invalid? Does MCL 750.520n(1) require lifetime electronic monitoring for a first degree criminal sexual conduct convictions unless it involved a victim who is younger than 13 and defendant who is older than 17?

Court of Appeals answers, "Yes".

Defendant-Appellant answers, "No".

II. Because a sentencing court is not authorized to correct a valid sentence except as provided by law, and may not correct an invalid sentence/substantive mistake after judgment without a party's timely motion, did the sentencing court here have authority to amend defendant comer's sentence nearly twenty months after the original sentencing and more than six months after resentencing?

Court of Appeals answers, "Yes".

Defendant-Appellant answers, "No".

STATEMENT OF FACTS

Introduction

This case involves the imposition of the penalty of lifetime electronic monitoring (LEM) where the victim in the case was an adult. The trial court imposed the penalty 20 months after the original sentencing (following two sentence hearings), sua sponte, without motion from a party.

Original Plea and Sentencing

On September 2, 2011, Defendant Appellant Justin Timothy Comer pled guilty in the St. Clair County Circuit Court to criminal sexual conduct (CSC) in the first degree, MCL 750.520b(1)(c) and to home invasion in the second degree, MCL 750.110a(3). On October 3, 2011, Judge Adair sentenced Mr. Comer to terms of 51 months to 18 years for the CSC conviction and to 51 months to 15 years for the home invasion conviction. *Judgment of Sentence*, attached as *Appendix A*.

The charges arose from Mr. Comer's entry into a home without permission where he digitally penetrated the sleeping homeowner. Mr. Comer entered his plea in exchange for dismissal of a charge of home invasion in the first degree, MCL 740.110a. *Plea transcript, September 2, 2011* (PL) 4. The trial court relied on Mr. Comer's statement, the victim's impact statement and the presentence information report in imposing a bottom of the guidelines sentence. ST 15. No one mentioned LEM, and the court did not impose it.

Defendant's First Direct Appeal and Resentencing

Mr. Comer sought leave to appeal in the Court of Appeals challenging the finding in Offense Variable 10 that he engaged in predatory conduct. The Court of Appeals agreed with the defendant and remanded for resentencing. *Court of Appeals Order, Appendix B.*

Judge Adair resentenced Mr. Comer on October 8, 2012, and again imposed sentence at the bottom of the now lowered guidelines. *Amended Judgment of Sentence, Appendix C.* At this resentencing, again, there was no mention of LEM and the court did not impose it.

Department of Corrections Contacts the Circuit Court

The issue of lifetime electronic monitoring first arose almost four months after the October 8, 2012 resentencing. In a letter to the circuit court from the Department of Corrections (DOC) dated January 29, 2013, the DOC informed the court that the Judgment of Sentence may require correction regarding the application of LEM, asserting that LEM is mandated in all cases involving MCL 750.520(b) following *People v Brantley*, 296 Mich App 546; 823 NW2d 290 (2012); *lv denied* 821 NW2d 574 (2012); reconsideration denied 826 NW2d 716 (2013). *Letter, Appendix D.* The DOC provided copies to appellate counsel, who had represented Mr. Comer at the resentencing, and to the prosecutor. Appellate counsel wrote a letter to the court in response objecting to any imposition of LEM as an improper post-appeal increase in penalty and an increase in penalty above what was advised at the time of the plea. *Counsel's letter, Appendix E.*

Circuit Court Sua Sponte Orders a Second Resentencing

The prosecutor did not file a motion for resentencing. *Register of Action, Appendix F.* Over objection by appellate counsel for Mr. Comer, the trial court *sua sponte* ordered resentencing April 29, 2013. *Notice to Appear, Appendix G.* Appellate counsel filed formal

objections to imposition of LEM including that neither party had filed a motion and that LEM had to be imposed at the time of sentencing. *Objections, Appendix H*. The prosecutor's written response stated that, under *People v Harris*,¹ no motion was required: "[t]his Court has both jurisdiction and authority to correct an invalid sentence on its own motion, regardless of whether either party could bring such a motion." *Reply, Appendix I*, p7. Further, the prosecutor asserted that LEM was a direct consequence of the plea under *People v Brown*,² and *People v Cole*,³ which required advice at the time of the plea, or advice with an opportunity to withdraw the plea. *Id.* at 8. This Reply was filed April 26, 2013, outside the six month period for filing a motion to correct invalid sentence, which ran on April 8, 2013. *Appendix F*.

At the hearing, again without timely motion from either party and over objection, the court offered plea withdrawal. The court pronounced that the plea was invalid and it would not proceed with regard to sentencing until the invalid plea was resolved:

As I look at this situation, we have a plea that has resulted in a sentence that based upon my review of the law and the circumstances in this case at present is an invalid plea. That plea failed to be voluntary as voluntariness is described by law and that is because of the requirement of mandatory lifetime electronic monitoring was not brought to Mr. Comer's attention at the time that his guilty plea was tendered to the court. He was not made aware of that so he could not base that as a part of his overall assessment in determining whether or not he wished to plead guilty based upon the offer that had been made. So, I find that the plea as originally taken is defective for those reasons.

And the long and short of that is it makes your guilty plea defective and I'm not going to proceed further with the plea being defective. [*Resentencing Transcript, April 29, 2013, (RST 2) 4-5, Appendix JJ*].

¹ 224 Mich App 597 (1997).

² 492 Mich 684, 698-99 (2012).

³ 491 Mich 325 (2012).

Appellate counsel argued that plea withdrawal would not be triggered unless the court determined that it must impose LEM, and that the court could not now impose LEM because correction of a substantive mistake required a motion by a party. RST2 6-7.

The court appeared to believe that any error could be corrected at any time:

The Court: Are you suggesting that the Court doesn't have the ability to go back and correct what it sees as an invalid sentence? Don't I have that right at any time?

Ms. Ouvry: Only –

The Court: I don't have to wait for the Prosecutor to tell me, do I?

Ms. Ouvry: Your Honor, our position is only if it's a clerical mistake. If it's a substantive mistake after the Judgment has been entered, then our argument is that you cannot procedurally impose the lifetime electronic monitoring. So, so we would have a procedural question first before Mr. Comer would answer the plea withdraw[al] question. [RST2 6-7.]

The court determined “[t]his is not a question of whether the sentence is invalid. This is a question as to whether the plea is invalid” and it would not allow an invalid plea to stand. RST2 8-9. The court offered additional time to discuss plea withdrawal but insisted it would not proceed to resentencing until defendant decided whether or not he would withdraw his plea. RST2 8. Appellate counsel indicated that she would allow Mr. Comer to answer whether or not he wished to have more time to talk to counsel. *Id.* Mr. Comer answered: “Your Honor, I do not wish to withdraw my plea.” *Id.*

The Court informed Mr. Comer that if he wanted his plea to stand, “the mandatory lifetime electronic monitoring is going to be part of that penalty. I have no discretion. At least that's how I view my obligation in this case. I have no discretion but to order that. Do you understand?” Mr. Comer agreed. RST2 10. The Court then found that “the problem with the earlier plea has now been corrected” and proceeded to resentencing. RST2 11.

The trial court imposed LEM with the understanding that it had no discretion. RST212.
Second Amended Judgment of Sentence, Appendix K.

Defendant's Second Direct Appeal

Mr. Comer sought leave to appeal in the Court of Appeals challenging the application of lifetime electronic monitoring. The Court affirmed his sentence. Judge Gleicher wrote a concurrence to indicate she would not affirm the sentence, were she not constrained by *People v Harris*, 224 Mich App 587 (1997). This Court granted oral argument on Defendant's Application.

Mr. Comer now asks this Honorable Court to reverse and remand for removal of the provision of lifetime electronic monitoring from the sentence.

- I. Defendant's original sentence was not invalid. MCL 750.520n(1) does not require lifetime electronic monitoring for a first degree criminal sexual conduct convictions unless it involved a victim who is younger than 13 and defendant who is older than 17.**

Introduction

The issue presented here requires this Court to construe MCL 750.520n. In addition to the possible prison terms set out for punishing CSC-I in MCL 750.520b(2)(a)-(c), MCL 750.520b(2)(d), requires the imposition of LEM "under section 520n." And, MCL 750.520n(1) requires:

A person convicted under section 520b or 520c for criminal sexual conduct committed by an individual 17 years old or older against an individual less than 13 years of age shall be sentenced to lifetime electronic monitoring as provided under section 85 of the corrections code of 1953, 1953 PA 232, MCL 791.285. (Emphasis added.)

Does MCL 750.520n only provide for LEM where the victim is under age 13, regardless of whether the conviction offense is CSC-1 or CSC-2? Or, instead, does the statute's age limitation only apply to CSC-II convictions and require the imposition of LEM for all CSC-1 offenses?

The Court of Appeals binding authority held that LEM applies to all CSC-1 convictions regardless of the age of the victim. *People v Brantley*, 296 Mich App 546; 823 NW2d 290 (2012). However, that holding was later questioned in *People v King*, 297 Mich App 465; 824 NW2d 258 (2012).

Applying the rules of statutory construction, this Court should overrule *People v Brantley*, 296 Mich App 546 (2012), and reverse and remand to strike the LEM provision from Mr. Comer's sentence. Neither the original sentence nor the sentence imposed at the first resentencing for CSC-I were invalid for the lack of LEM where the victim was an adult.

Standard of Review

This Court applies de novo review to questions of statutory interpretation. *People v Cunningham*, 496 Mich 145, 149; 852 NW2d 118 (2014).

Rules of Statutory Interpretation

The primary goal of statutory interpretation is to ascertain and give effect to the intent of the Legislature. If the statute is unambiguous on its face, the Legislature is presumed to have intended the meaning expressed, and judicial construction is neither required nor permissible. *McElroy v Michigan State Police Criminal Justice Info. Ctr.*, 274 Mich App 32, 36-37, 731 NW2d 138, 141 (2007); *People v Laney*, 470 Mich 267; 680 NW2d 888 (2004).

The actual words used in the statute provide us with the most reliable evidence of the Legislature's intent. The court must consider both the plain meaning of the critical words or phrases as well as their placement and purpose in the statutory scheme. It is necessary to avoid a construction that would render any part of a statute surplusage or nugatory. *People v Cunningham*, 496 Mich 145, 153-54, 852 NW2d 118, 123 (2014)(citations omitted); *People v Waltonen*, 272 Mich App 678, 684-85, 728 NW2d 881, 885 (2006)(citations omitted).

Under MCL 750.2, all provisions in the Penal Code must be construed “according to the fair import of their terms, to promote justice and to effect objects of the law.” *People v Hotrum*, 244 Mich App 189; 624 NW2d 469 (2000).

The rules require that LEM is only applicable to CSC-I convictions where the victim is less than 13 years of age and the defendant is older than 17 years of age.

Following the rules of statutory interpretation, this Court should overrule *Brantley*. First, the plain language of MCL 750.520n requires a different result, as the *Brantley* Court itself acknowledged. A plain reading of both MCL 750.520n(1) and MCL 750.520b(2)(d),

accompanied by deference to Legislative intent, requires the finding that LEM does not apply when the victim of the CSC offense is over the age of 13. Second, if the courts must resort to other rules of statutory construction, it is still apparent that the Legislature intended the limiting phrase to apply to both MCL 750.520b (CSC-I) and MCL 750.520c (CSC-II).

The concurrence in *Brantley*, the panel that decided *People v King*, 297 Mich App 465, 824 NW2d 258 (2012), and at least four other (unpublished) decisions⁴ of the Court of Appeals would apply the rules of statutory interpretation to reach a different conclusion than *Brantley*. Each correctly held that plain language requires vacation of the imposition of LEM when the victim is older the 13 years of age.

A) A plain language reading of the statute requires the finding that the age restrictions apply to all CSC convictions.

The first rule of statutory construction is that where the words in the statute convey the Legislature's intent judicial construction is neither required nor permitted. Reviewing courts must avoid a construction that would render any part of a statute surplusage or nugatory. *People v Cunningham*, 496 Mich 145, 153-54, 852 NW2d 118, 123 (2014)(citations omitted); *People v Waltonen*, 272 Mich App 678, 684-85, 728 NW2d 881, 885 (2006)(citations omitted).

While MCL 750.520n(1) may be inartfully drafted, the intent is clear from the words of the statute. The *Brantley* majority reasoned that the age limiting modifying phrase must modify either "under section 520b or 520c" or simply "520c." But this reading ignores the language "for

⁴. *People v Bowman*, unpublished per curiam opinion of the Court of Appeals, issued November 9, 2010 (Docket No. 292415)(no support for LEM where victim over the age of 13), *People v Quintana*, unpublished per curiam opinion of the Court of Appeals issued May 19, 2011 (Docket No. 295324)(finding the language unambiguous), *People v Floyd*, unpublished per curiam opinion of the Court of Appeals issued September 20, 2011 (Docket No. 297393)(plain reading of the statute does not support LEM), *People v Hampton*, unpublished per curiam opinion of the Court of Appeals issued December 20, 2011 (Docket No. 297224)(plain language of statute does not support application of LEM). *Appendix K*.

criminal sexual conduct” placed directly before the modifying phrase. Rules of grammatical construction require that a preposition follow its object.⁵ Because the phrase “by an individual 17 years old or older against an individual less than 13 years of age” is its own prepositional phrase, which follows “for criminal sexual conduct,” it modifies that phrase. This reading gives meaning to the phrase “for criminal sexual conduct,” because one older than 17 who commits *criminal sexual conduct* against one less than 13 years will be subject to LEM.

It is significant that the Legislature did not use the phrase “for criminal sexual conduct in the second degree,” the crime delineated in Section 520c, in the phrase immediately preceding the age limitation of Section 520n(1). Rather, it uses the more general “criminal sexual conduct”, which connotes crimes in addition to those set forth in Section 520c. And the sentence tells us which additional crimes those are by referencing Section 520b, “criminal sexual conduct” in the first degree. Had the Legislature intended the age provision to apply only to convictions under Section 520c, it would have specified as such in the “criminal sexual conduct” phrase. It did not and thus made clear its intention not to so limit the age-modifier.

Grammar principles support this conclusion. See *People v Beardsley*, 263 Mich App 408, 412–413; 688 NW2d 304 (2004) (Noting that Legislature is presumed to have known the rules of grammar.). Rules of grammatical construction require that a preposition follow its object.⁶ Simply put, since the phrase “by an individual 17 years old or older against an individual less than 13 years of age” is its own prepositional phrase, which follows “for criminal sexual conduct,” it modifies that phrase. And the phrase “for criminal sexual conduct” has meaning. Ignoring the “for criminal sexual conduct” language as the *Brantley* majority did, renders that

⁵ The Redbook, A Manual On Legal Style, Third Edition, Bryan Garner, pp209.

⁶ The Redbook, A Manual On Legal Style, Third Edition, Bryan Garner, pp209.

phrase surplusage, which violates one of the tenets of the statutory construction rules. *Cunningham*, 496 Mich at 153-54. Everything within Section 520c is a form of “criminal sexual conduct” and it would thus add nothing to the description of the scope of the LEM provision to simply state again what Section 520c already includes. To be sure, the “criminal sexual conduct” language also is redundant with Section 520b, which also defines “criminal sexual conduct” crimes. But in this case, it is a redundancy for a reason because it is there to remind us that when the victim is under 13 and the defendant is over 17, only criminal sexual conduct crimes that fall within Section 520b and 520c must include lifetime electronic monitoring.

B) *People v Brantley* misapplied the last antecedent rule and ignored the series qualifier rule. Moreover, it wrongfully disregarded the statute’s plain language

In *Brantley*, the Court of Appeals majority applied the “last antecedent rule” and determined that the phrase “for criminal sexual conduct committed by an individual 17 years old or older again an individual less than 13 years of age” applied only to convictions of CSC-II under MCL 750.520c, not to convictions under MCL 750.520b. *Brantley*, *supra* at 557.

The last antecedent rule requires that “a limiting clause or phrase ... should ordinarily be read as modifying only the noun or phrase that it immediately follows.” *Barnhart v Thomas*, 540 US 20, 26; 124 S Ct 376; 157 LEd2d 333 (2003). The “rule” eases the interpretation of modifying clauses, and is most useful “where it takes more than a little mental energy to process the individual entries in the list, making it a heavy lift to carry the modifier across them all.” *Lockhart v United States*, 136 S Ct. 958, 963; ___ L Ed 2d ___ (2016). The *Brantley* majority misapplied this rule in several respects.

First, the majority identified the incorrect antecedent. The modifying phrase “by an individual 17 years old or older against an individual less than 13 years of age” modifies the phrase that immediately precedes it, which is “for criminal sexual conduct.” Thus, all criminal sexual conduct is modified by the limiting phrase “by an individual 17 years old or older against an individual less than 13 years of age.” And the reader is told which CSC crimes committed within that age group must receive LEM in the list that precedes both phrases; those that fall within MCL 750.520b and 520c.

Second, by ignoring the “for criminal sexual conduct” language, the *Brantley* majority misused the last antecedent rule to trump what was otherwise a clear legislative intent reflected in a reading of Section 520n(1) as a whole. It is well-established that the last antecedent rule “is not an absolute and can assuredly be overcome by other indicia of meaning” found in statutory language. *Barnhart*, supra. “[S]tructural or contextual evidence may “rebut the last antecedent inference.” *Lockhart v United States*, 136 S Ct 958, 965; 194 L Ed 2d 48 (2016), *Jama v Immigration and Customs Enforcement*, 543 US 335, 344, n4; 125 S Ct 694, 160 L Ed 2d 708 (2005). As demonstrated above, the structure and context of MCL 750.520n(1), namely its use of “criminal sexual conduct” rather than “second degree criminal sexual conduct” immediately preceding the age limitation phrase, provides the “other indicia of meaning” to overcome the last antecedent rule.

And third, the *Brantley* majority failed to recognize that the last antecedent rule simply does not apply to Section 520n(1)’s simple and short series of statutory sections that precedes the age limiting clause. When a modifying clause of a statute follows a series, courts must interpret a complex series differently than a simple series. The more complex the series, the greater opportunity for confusion and the greater need for a rule like the last antecedent rule. *Lockhart v*

United States, 136 S Ct. 958, 969;; ___ L Ed 2d ___ (2016). (Kagan J., dissenting). The “rule” eases the interpretation of modifying clauses, and is most useful “where it takes more than a little mental energy to process the individual entries in the list, making it a heavy lift to carry the modifier across them all.” *Lockhart, supra.* at 963 But, where “[n]o reasons appears why a modifying clause is not ‘applicable as much to the first and other words as to the last’ and ...there is no reason consistent with any discernable purpose of the statute to apply the limiting phrase to the last antecedent alone” the last antecedent rule need not apply. *Lockhart, supra* at 965. “When there is a straightforward, parallel construction that involves all nouns or verbs in a series, a modifier at the end of the list ‘normally applies to the entire series.’” *Id.* at 969 (Kagan, J dissenting).⁷

Furthermore, the last antecedent only applies when the series of nouns and verbs are not in parallel. See *Porto Rico Ry., Light & Power Co. v Mor*, 253 US 345, 348; 40 S Ct 516, 518; 64 L Ed 944 (1920). Under the “series qualifier cannon” the last antecedent rules does not apply where, as here, “[t]he modifying clause appear[s] ... at the end of a single, integrated list.” *Jama*, 543 U.S., at 344, n. 4.

Two cases cabin the parameters of the last antecedent rule’s applicability. In *People v Small*, 467 Mich 259, 650 NW2d 328 (2002), this Court interpreted the carjacking statute, which states:

A person who by force or violence, or by threat of force or violence, or by putting in fear robs, steals, or takes a motor vehicle as defined in [M.C.L. § 750.412] from another person, in the presence of that person or the presence of a passenger or in the presence of any other person *in lawful possession of the motor vehicle*, is guilty of carjacking, a felony punishable by imprisonment for life or for any term of years. [Emphasis added.] *Id.* at 262.

⁷ Justice Kagain quoted from *Reading Law: The Interpretation of Legal Texts* by Justice Scalia and Bryan Garner.

The question was what the phrase “in lawful possession” modifies. The series involved was unquestionably complex: “another person, in the presence of that person or the presence of a passenger or in the presence of any other person.” The Court applied the last antecedent rule and held that “in lawful possession” only applies to the words “in the presence of any other person” in the carjacking statute. It does not modify the preceding phrases “in the presence of that person” or “in the presence of a passenger.” *Id.* at 263. This application clears confusion. There is no question that it would be a heavy mental load to carry the modifying phrase across the whole series in this statute.

In contrast, this Court in *Drake v Indus. Works*, 174 Mich 622 (1913), held that a modifying phrase applied to two antecedents, rather than simply the last. The Court found “a contrary intention” opposing application of the last antecedent rule within the act “when its history, purpose and context are considered.”⁸ And, without naming the “series qualifier canon,” this Court recognized that the language of the statute itself can demand applying the modifying phrase across multiple nouns or verbs: “when several words are followed by a clause which is applicable as much to the first and other words as to the last, the natural construction of the language demands that the clause be read as applicable to all.” *Great Wolf Lodge of Traverse City, LLC v Pub Serv Comm’n*, 489 Mich 27, 45; 799 NW2d 155 (2011).

This case is similar to *Drake* and distinguishable from *Small*. Considering MCL 750.520n(1), the series in question is “under section 520b or 520c.” The series is simple, and the two terms are related, parallel statutory sections, invoking the series-qualifier canon. There is no heavy mental lifting between “520b” and “520c” which would require application of the last antecedent rule. The modifying phrase “for criminal sexual conduct committed by an individual

⁸See also *Amicus, Wayne County Prosecutor’s Office*, p14.

17 years old or older against an individual less than 13 years of age” applies to the entire series. The series is straightforward, the mental task is simple, and the meaning is plain. LEM does not apply when the victim is over the age of 13.

In addition, the *Brantley* majority considered reading MCL 750.520n *in pari materia* with MCL 750.520b(2)(d) and MCL 750.520c(2)(b). They found that in spelling out the penalties for each offense, MCL 750.520b(2)(d) is silent with regard to age but that MCL 750.520c(2)(b) includes an age modifying clause. The majority inferred that the inclusion in one statute and omission in another conveyed Legislative intent. They concluded that LEM must apply to all CSC-I offenses regardless of age.

But, the Court of Appeals in *People v King* correctly pointed out the flaw in this approach. It noted that both MCL 750.520b and 750.520n “are equally susceptible to more than one meaning.” *Id.* at 485. Thus, the Court focused instead on the plain language included in MCL 750.520b(2)(d), rather than draw intent from omissions. *Id.* at 486. The Court recognized that the inclusion of the language “under section 520n” in MCL 750.520b(2)(d) limits the application of LEM to either CSC I or CSC II where the victim is under age 13. This reading comports with Legislative intent to protect the most vulnerable. *Id.*

For these reasons, *Brantley* was wrongly decided. The majority ignored the plain language of MCL 750.520n(1), rendered the phrase “criminal sexual conduct” that preceded the age modifying clause nugatory, and misapplied the last antecedent rule to the short, simple list of parallel and similar statutes.

Rule of Lenity

To the extent that the statutes contain ambiguity, the rule of lenity applies. Where a statute is ambiguous, the rule of lenity requires that the ambiguity be resolved in favor of lenity and imposition of harsher punishment. *People v Bergevin*, 406 Mich 307; 279 NW2d 528 (1979); *US v Granderson*, 511 US 39, 114 S Ct 1259, 127 L Ed 2d 611 (1995). The reviewing court should apply lenity if doubt persists after reviewing the language of the statute, legislative history, and policies. *Moskal v United States*, 498 US 103, 108; 111 S Ct 461, 465; 112 L Ed 2d 449 (1990). The rule of lenity requires that the ambiguity be resolved in favor of lenity and imposition of harsher punishment. *People v Bergevin, supra*; *US v Granderson, supra*.

Defendant asserts that both the plain language of the statute and proper application of grammatical rules reveal the Legislative intent is clear. LEM applies only when the victim is less than 13. Nonetheless, if after the Court reviews the statute, history and policies, it is left with ambiguity, lenity requires narrowly construing the statute to apply LEM only when the victim is less than 13 years old.

For these reasons, *Brantley, supra* was wrongly decided. Mr. Comer's original sentence and the sentence imposed following his first direct appeal were not invalid for lacking LEM. The trial court erred by altering a valid sentence in Mr. Comer's case. This Court should reverse and remand to strike the LEM provision.

II. Because a sentencing court is not authorized to correct a valid sentence except as provided by law, and may not correct an invalid sentence/substantive mistake after judgment without a party's timely motion, the sentencing court here had no authority to amend defendant comer's sentence nearly twenty months after the original sentencing and more than six months after resentencing.

Introduction

The decision in this case requires the interpretation of MCR 6.429 and MCR 6.435, which set forth:

MCR 6.429 provides, in pertinent part:

- (A) *Authority to Modify Sentence.* *A motion to correct an invalid sentence may be filed by either party.* The court may correct an invalid sentence, but the court may not modify a valid sentence after it has been imposed except as provided by law.
- (B) *Time for Filing Motion.*
 - (1) A motion to correct an invalid sentence may be filed before the filing of a timely claim of appeal.
 - (2) If a claim of appeal has been filed, a motion to correct an invalid sentence may only be filed in accordance with the procedure set forth in MCR 7.208(B) or the remand procedure set forth in MCR 7.211(C)(1).
 - (3) If the defendant may only appeal by leave or fails to file a timely claim of appeal, a motion to correct an invalid sentence may be filed within 6 months of entry of the judgment of conviction and sentence.
 - (4) If the defendant is no longer entitled to appeal by right or by leave, the defendant may seek relief pursuant to the procedure set forth in subchapter 6.500. (Emphasis added.)

MCR 6.435 provides, in pertinent part:

- (A) *Clerical Mistakes.* Clerical mistakes in judgments, orders, or other parts of the record and errors arising from oversight or omission may be corrected by the court at any time on its own initiative or on motion of a party, and after notice if the court orders it.
- (B) *Substantive Mistakes.* After giving the parties an opportunity to be heard, *and provided it has not yet entered judgment in the case*, the court may reconsider and modify, correct, or rescind any order it concludes was erroneous. (Emphasis added.)

Standard of Review

This Court reviews de novo lower courts' interpretations and applications of statutes and court rules. *People v Lee*, 489 Mich 289, 295, 803 NW2d 165, 168 (2011).

Argument

The Court of Appeals here found that Defendant's original sentence was invalid because it did not contain provision for LEM, pursuant to *Brantley, supra*, and that MCR 6.429(A) imposes no jurisdictional time limits upon a trial court's authority to correct an invalid sentence, pursuant to *People v Harris*, 224 Mich App 597, 569 NW2d 525 (1997). *People v Comer*, 312 Mich App 538 (2015). The Court of Appeals erred for two reasons First, as discussed in *Issue I, supra*, Mr. Comer's original sentence was valid and thus could not be changed in this manner. Second, even if the lack of LEM rendered Defendant's sentence invalid, *Harris* was nonetheless wrongly decided. The *Harris* court did not consider MCR 6.435, misinterpreted MCR 6.429 in holding that it allowed a sentencing court to *sua sponte* order resentencing after judgment has entered without motion by either party under subsection (A) and in holding that the sentencing court in doing so did not have to comply with the time limitations of subsection (B), and ignored this Court's controlling authority, i.e. *People v Lee, supra*.

First: Mr. Comer's sentence without the imposition of LEM was valid.

As explained above, in Issue I, incorporated herein by reference, Mr. Comer's sentence without the imposition of LEM was valid. If this Court agrees, then the trial court had no authority to modify the sentence. Where "the original judgment of sentence was valid when imposed, the sentencing judge had no authority to modify it pursuant to MCR 6.429(A)." *People*

v Holder, 483 Mich 168, 170; 767 NW2d 423 (2009). Therefore the circuit court had no authority to modify it pursuant to MCR 6.429.

Second: Even if it was error to fail to impose LEM at sentencing, it was a substantive error. Correction of substantive errors is limited by MCR 6.435 and MCR 6.429.

If this Court holds in *Issue I*, that Mr. Comer's original sentence was invalid because it did not contain impose LEM, the trial court was nevertheless without lawful authority to change it without a motion from a party 20 months after it was originally imposed and more than six months after resentencing.

Only clerical errors to the judgment of sentence may be corrected at any time. MCR 6.435(A). Substantive errors cannot be *sua sponte* corrected after the judgment of sentence has been imposed. MCR 6.435(B); MCR 6.429(A). And substantive errors cannot be corrected outside the time limitations provided in MCR 6.429(B).

In *Holder*, this Court emphasized that the DOC is not a party to the case; that notices sent by the DOC to trial courts are merely information; and that these letters do not excuse ignoring these court rules:

“While the DOC certainly has an obligation to ensure that any sentence executed is free from errors, the department is not a party to the underlying criminal proceedings under either MCR 6.429 or MCR 6.435. As a result, we wish to reiterate that any notices sent from the DOC to the courts and parties regarding sentencing errors are merely informational, and any requests contained therein merely advisory. Any judge receiving such a notice must ascertain the nature of the claimed error, determine whether the error implicates a defendant's sentence, and consider the curative action recommended by the DOC. It is imperative, however, that any corrections or modifications to a judgment of sentence must comply with the relevant statutes and court rules. Significantly, if the claimed error is substantive, the court may modify the sentence only “[a]fter giving the parties an opportunity to be heard” and *if “it has not yet entered judgment in the case....” MCR 6.435(B).*” *Holder*, 483 Mich at 176-177 (footnotes omitted; emphasis added).

According to the 1989 Staff Comment to MCR 6.435, subrule (A) permits a court to correct “an inadvertent error or omission in the record, or in an order or judgment.” In interpreting the same language in MCR 2.612(A)(1), the Court of Appeals held that the purpose “is to make the lower court record and judgment accurately reflect what was done and decided at the trial level.” *Central Cartage Co v Fewless*, 232 Mich App 517, 536; 591 NW2d 422 (1998) (discussing MCR 2.612(A)(1), which is identical to MCR 6.435(A)) (citation and quotation marks omitted).

The staff comment explains that Subrule (B), addressing “substantive mistakes,” “pertains to mistakes relating not to the accuracy of the record, but rather, to the correctness of the conclusions and decisions reflected in the record.” The comment continues, “Substantive mistake refers to a conclusion or decision that is erroneous because it was based on a mistaken belief in the facts or the applicable law.” MCR 6.435, 1989 Staff Comment. The comment provides the following examples intended to “illustrate the distinction” between clerical and substantive mistakes:

A prison sentence entered on a judgment that is erroneous because the judge misspoke or the clerk made a typing error is correctable under subrule (A). A prison sentence entered on a judgment that is erroneous because the judge relied on mistaken facts (for example, confused codefendants) or made a mistake of law (for example, unintentionally imposed a sentence in violation of the Tanner rule) is a substantive mistake and is correctable by the judge under subrule (B) until the judge signs the judgment, but not afterwards. [*Id.*]

Applying these definitions, the absence of LEM from two judgments of sentence in this case, if it was required, was a substantive legal mistake. The opportunity to impose LEM was twice before Judge Adair, at the original sentencing and again at the first resentencing. Neither time did the prosecutor ask for it to be imposed. Neither time did the court impose it. This is not a term of sentence that the judge orally imposed and was just mistakenly omitted from the

judgment of sentence. This is not a typing error by the court reporter or the clerk or anyone else. If there was a mistake, it was substantive, correctable only until the judge signed the judgment of sentence and not afterward, unless the parties followed the procedure of MCR 6.429.

MCR 6.429 provides the framework for addressing substantive errors after the judgment of sentence has been entered. It specifically provides that the parties can move to correct substantive mistakes within the certain time limitations. MCR 6.429(A) does not condone a circuit court *sua sponte* ordering resentencing or amending the judgment of sentence. MCR 6.429(A) begins with the sentence “A motion to correct an invalid sentence may be filed by either party.” The first sentence of the subrule requires a party to file a motion to correct invalid sentence. This structure is intentional. Subsection (B) then lays out the time frames for doing so. MCR 6.429(B)(1)-(4). By its plain language, the court rule does not allow for *sua sponte* corrections by the circuit court, and certainly not after the time frame in which the parties would be allowed to do so.

In *People v Lee*, 489 Mich 289, 803 NW2d 165 (2011), this Court examined MCR 6.429 and held that a trial court is without authority to grant a prosecutor’s motion to correct an invalid sentence filed outside the applicable 6-month time limitation. This Court explained why in detail:

As a result of these procedural errors by the trial court, *the sentence imposed in the March 20, 2006, judgment of sentence may have been invalid. See People v Whalen*, 412 Mich 166, 170, 312 NW2d 638 (1981) (recognizing that sentences that “do not comply with essential procedural requirements” are invalid). Thus, *the prosecution could have sought to correct the sentence because, under MCR 6.429(A), “[a] motion to correct an invalid sentence may be filed by either party.*

In this case, however, *the time limits to bring a motion to correct an invalid sentence were long past. MCR 6.429(B) sets the time limits for a motion to correct an invalid sentence, and that court rule applies to prosecutors and defendants alike* because the statute governing appeals by the prosecution, *MCL 770.12, does not indicate that the prosecution is entitled to seek relief beyond the time*

provided in the court rules. Because defendant entered a plea in this case, he could only appeal by leave of the Court of Appeals. See MCR 6.302(B)(5). Therefore, in this case, MCR 6.429(B)(3) required that a motion to correct the sentence be brought “within 6 months of entry of the judgment of conviction and sentence.” But the prosecution's motion to require registration was filed 20 months after the judgment of sentence entered. Thus, even if the sentence imposed in the March 20, 2006, judgment of sentence was invalid because of the procedural errors relating to registration under SORA, the prosecution's motion was untimely under MCR 6.429(B)(3), and the trial court should have denied it.” Lee, supra at 298-299 (footnotes omitted)(emphasis added).

As explained in *Lee, supra*, sentencing courts are not authorized to correct substantive mistakes without a timely motion from a party consistent with MCR 6.429. Sentencing courts are not at liberty to act as a second prosecutor to *sua sponte* correct a substantive error after the prosecutor's time for seeking correction in accordance with MCL 770.12 and MCR 6.429 has run out.

This Court must overrule *People v Harris*, 224 Mich App 597, 569 NW2d 525 (1997), because it contradicts *People v Lee* and the plain language of MCR 6.429, in holding that MCR 6.429 does not limit the trial court's authority to correct substantive mistakes whenever they are discovered and in dicta commenting that “a motion for resentencing is not a condition precedent for a trial court to correct an invalid sentence.”⁹ The *Harris* Court looked not to *Lee*, which it does not mention, but instead relied on an earlier decision from this Court, *People v Miles*, 454 Mich 90; 559 NW2d 299 (1997).

⁹ In *Harris*, the trial court sentenced the defendant under a false name. The DOC discovered the deception and notified the court by letter. Over one year after sentencing, the prosecutor moved for resentencing, and the trial court granted it, finding that the sentence previously imposed was invalid, because it was based on inaccurate information. The judge then imposed a consecutive sentence. *Id.* at 598-599. The Court of Appeals found that MCR 6.429(A) gave the trial court the authority to correct an invalid sentence; that “a motion for resentencing is not a condition precedent for a trial court to correct an invalid sentence under MCR 6.429(A); and that although a defendant's right to due process must be satisfied”, MCR 6.429(A) set no time limits with respect to a trial court's authority to correct the sentence.

Miles is distinguishable, but to the extent that it is inconsistent with *Lee* it has been overruled. In *Miles*, the judgment was modified *sua sponte* within a few months after the original sentencing, after the defendant filed a claim of appeal, without notice to the parties or an opportunity to be heard.¹⁰ This Court held that the original sentence was invalid because it was based on inaccurate information. *Miles* at 96. This Court held “the trial court erred when it modified defendant's felony-firearm sentence and implicitly resentenced defendant to the same prison term for armed robbery *sua sponte* and without a resentencing hearing.” *Miles* at 97. However, this Court held that the error was harmless. *Miles* at 101. In *Miles*, the sentencing court modified the judgment of sentence to add a mandatory term of sentence within the time in which the prosecutor could have properly sought to do so. See MCR 6.429(B)(2). In the more recent *Lee, supra*, this Court was likewise faced with a mandatory term, i.e. SORA registration, but this Court disallowed amending the judgment of sentence to add it outside the time constraints of MCR 6.429(B), even though the matter of SORA registration had been reserved at the original sentencing. *Lee* at 292-294, 298-299.

Though not relied on by the Court of Appeals in this case as *Harris* was, Appellant also notes that the Court of Appeals likewise ignored *Lee* in *People v Howell*, 300 Mich App 638 (2013). In *Howell*, the Court of Appeals has wrongfully held that any failure to include a mandatory term of sentence is a clerical error or omission subject to correction at any time. This is contrary to the applicable court rules as explained above. Moreover, *Howell* like *Harris* is in contravention of this Court's decision in *People v Lee*, 489 Mich 289 (2011).

¹⁰ The defendant was originally sentenced to a two year term for felony firearm as no prior felony firearm conviction was listed in the presentence report. Within six weeks of sentencing, the DOC notified the sentencing court that it had discovered a record indicating the defendant had a prior felony firearm conviction, and thus the sentence should have been five years. The sentencing court *sua sponte* corrected it by entering an amended Judgment of Sentence shortly thereafter while the defendant's claim of appeal was pending in the Court of Appeals, without a resentencing hearing and without even providing notice to either party. *Miles, supra*.at 92-94.

The interpretation of MCR 6.429 in *Lee* promotes finality of judgments. Federal and state courts, have consistently found that considerations of finality and administrative consequences must become part of the process with which we assure the achievement of proceedings that are consistent with the rudimentary demands of fair procedure. *People v Ingram*, 439 Mich 288, 293-294; 484 NW2d 214 (1992). This rule has special force in plea cases. *United States v Timmreck*, 441 US 780, 784, 99 S Ct 2085, 2087, 60 L Ed 2d 634 (1979); *Ingram, supra*.

This Court has explained that: “[t]he Rules of Criminal Procedure ‘are to be construed to secure simplicity in procedure, fairness in administration, and the elimination of unjustifiable expense and delay.’ MCR 6.002. The specific purpose for creating the postconviction procedure was to provide finality of judgments affirmed after one full and fair appeal and to end repetitious motions for new trials.” *People v Reed*, 449 Mich 375, 381; 535 NW2d 496 (1995).

And, the rule of finality should incentivize parties to raise claims of error timely, rather than withhold claims for tactical advantage:

“The adoption by the majority of this rule does nothing to further the interests of finality. Instead of providing incentive for raising claims on direct review where proper relief can be afforded and the error corrected, the majority allows a claim dormant for ten years to be resurrected when the defendant's tactical considerations so require.” *People v Crawford*, 417 Mich 607, 616, 339 NW2d 630 (1983)(Justice Brickley)

This Court abhors appellate parachutes. *People v Carter*, 412 Mich 214, 214; 313 NW2d 896 (2000). Criminal defendants’ fundamental constitutional rights, their statutory rights, and protections offered to them under the court rules have been found to be waived or forfeited where not timely raised and often are not reachable by collateral attack. *Ingram, supra*; *Reed, supra*; *Carter, supra*; *People v Carines*, 460 Mich 750; 597 NW2d 130 (1999). Likewise, neither the prosecutor, a non-party such as the DOC, nor the sentencing judge should be allowed to

collaterally attack a judgment, waiting until after the direct appeal period has run out -- a time when the defendant may well be unrepresented.

The problems that will proliferate if a sentencing court is allowed to modify a judgment without a party's motion and/or outside of the time limitations of MCR 6.429 is illustrated by the latest permutation in DOC sentencing error notice letters. The DOC has begun sending notice letters in cases where the defendant was sentenced as a habitual offender – 4th to a minimum term of less than 25 years (sometimes much less) and the DOC believes that the defendant was subject to the 25-year mandatory minimum of the super habitual offender – 4th provision added to MCL 769.12 in 2012. See MCL 769.12(1)(a).

Whether it's the super habitual – 4th, LEM, or SORA, when the parties mistakenly did not contemplate the “mandatory” provision before final judgment was entered and someone other than the parties asserts it, especially outside of the direct appeal period, it opens a Pandora's box. In a plea case, if the sentencing court modifies the judgment it may mean that the defendant's plea was involuntary, unknowing, and unintelligent and entered without the effective assistance of counsel. See *People v Cole*, 491 Mich 325; 817 NW2d 497 (2012). Or, it may mean that a *Cobbs* sentence evaluation by the judge or a sentence agreement with the prosecutor was violated, which would entitle the defendant to plea withdrawal.¹¹ In a trial case, it may mean that the convictions must be vacated because the defendant would have accepted an offered plea bargain had he known of this potential consequence. See *Lafler v Cooper*, 566 US ____; 132 S Ct 1376; 182 L Ed 2d 398 (2012). It can mean that months or even years of work in the trial court were wasted and the parties must start over. Starting over, months or even years beyond the direct appeal period would likely disadvantage one party or the other or both.

¹¹ See *People v Cobbs*, 443 Mich 276 (1993); *People v Killebrew*, 416 Mich 189 (1982); MCR 6.310(B)(2).

At a minimum, this Court should limit modifications/corrections to the judgment outside the time limitations of MCR 6.429(B) to instances where the defendant committed a material fraud on the sentencing court that prevented the error from being discovered earlier. See *Harris*.

Last, the forced choice between plea withdrawal and a resentencing that would include LEM violated due process and in no way cures the errors.

Judge West abused his discretion in threatening the defendant with plea withdrawal to force him to be resentenced so as to include LEM in his sentence. MCR 6.310 provides that a plea may be withdrawn upon a defendant's motion or with the defendant's consent within six months of sentencing. MCR 6.310(B) & (C). A "trial court may exercise its discretion to vacate an accepted plea only under the parameters of the court rule." *People v Strong*, 213 Mich App 107, 111-112; 539 NW2d 736 (1995). Threatening Mr. Comer with plea withdrawal in order to force LEM upon him was a violation of the court rule and due process. US Const, Am XIV; Const 1963, art 1, §17. This procedure in no way cured any error in the proceedings against Mr. Comer.

Conclusion

For the reasons explained above, Mr. Comer's sentence without LEM was valid. Even if it was invalid, the trial court lacked the authority to add LEM to Mr. Comer's sentence at such a late date and without a motion from the prosecutor. The trial court's actions were in violation of the court rules and threaten the finality of judgments. This Court should order the trial court to vacate the LEM provision from Mr. Comer's sentence.

SUMMARY AND REQUEST FOR RELIEF

WHEREFORE, for the foregoing reasons, Defendant-Appellant asks that this Honorable Court grant his application for leave to appeal and remand to strike LEM from the judgment of sentence.

Respectfully submitted,

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